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In the Supreme Court of the United States

No. 1305

BONITA M. TABOR, a Minor by LEWIS H. TABOR and BETTY W. TABOR, Her Parents and Natural Guardians, and LEWIS H. TABOR and BETTY W. TABOR, Individually and as Husband and Wife

vs.

RICHARD F. MILLER and JOHN R. STEARNS and HERBERT BOARDMAN LORD, JR. (3d Pty. Pltf.)

JOHN R. STEARNS, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MURRAY C. GOLDMAN
Attorney for Petitioner

1616 One East Penn Square
Philadelphia, Penna. 19107

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Case Caption

IN THE SUPREME COURT OF THE UNITED STATES

No.

Bonita M. Tabor, a minor by Lewis H. Tabor and Betty W. Tabor, her parents and natural guardians and Lewis H. Tabor and Betty W. Tabor, individually and as husband and wife

v.

Richard F. Miller and John R. Stearns and Herbert Boardman Lord, Jr. (3d Pty. Pltf.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John R. Stearns, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 25, 1968.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania dismissing defendant's motion for new trial is reported in 269 Fed. Supp. 647 (1967). The per curiam opinion of the Court of Appeals is F. 2d , 1968.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Were Petitioner's rights under the Soldiers' and Sailors' Civil Relief Act of 1940 violated by a failure to grant a continuance of the trial where petitioner's unavailability due to military service was unchallenged by the parties, the petitioner's credibility was a major issue to be passed upon by the jury, a verdict was rendered against petitioner substantially in excess of his liability insurance coverage, and a new and substantial element of damages arose during the course of the trial?

STATUTES INVOLVED

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending on it own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [Sections 501-548 and 560-590 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. Oct. 17, 1940, c. 888, §201, 54 Stat. 1181; 50 U.S.C. App. 3521.

STATEMENT OF THE CASE

This diversity action arises from a chain reaction motor vehicle collision which took place on June 9, 1961. Plaintiffs were in the first vehicle. Defendant Miller was in the second vehicle in the chain. Defendant Stearns was in the third and defendant Lord was in the fourth vehicle. Plaintiffs were struck in the rear by the vehicle driver by defendant Miller, but plaintiffs were basically uncertain as to how the accident occurred. At trial, they relied on the testimony of the defendants. Defendant Miller testified that his vehicle was pushed into the Tabor car by defendant Stearns. Defendant Stearns and his passenger (both testifying by deposition) contended that defendant Miller had already struck the plaintiff's car when the Stearns vehicle struck the Miller vehicle. The testimony of a police officer, Celia, supported defendant Stearns' version of the accident. Defendant Lord was also uncertain how the accident occurred. The credibility of Stearns and Miller was the determinative liability issue.

Counsel for defendant John R. Stearns, a career Air Force Officer then undergoing flight training, made three applications for a continuance pending Stearns availability for trial or completion of flight training or discharge from the service. Although the fact of his unavailability was then unchallenged, all applications were denied.

Defendant Stearns' absence was complicated by the fact that a substantial element of damages, aggravation

of plaintiff's mental illness, arose for the first time during the course of the litigation.

At the trial of the action the issue of liability was resolved against defendant Stearns only, in an amount which is substantially in excess of his insurance coverage.

Petitioner's motion for a new trial was denied by the United States District Court and the judgment affirmed by the United States Court of Appeals for the Third Circuit. This petition followed.

REASONS FOR ALLOWANCE OF WRIT

This case presents three issues which arise under the Soldiers' and Sailors' Civil Relief Act. Prior to their disposition by the lower courts, the questions had not been squarely decided. It appears, however, that the disposition made thus far in this case is contrary to the trend of earlier decisions of other federal and state courts. This conflict involves a matter of fundamental importance to all under the protection of the Soldiers' and Sailors' Relief Act, the parties engaged in litigation with them, and the public at large.

1. The effect of the existence of liability insurance and the extent of coverage on the request by an insured litigant for protection under the Soldiers' and Sailors' Relief Act has been partially treated by the Courts and considered by legal writers: *Boone vs. Lightner,* 319 U.S. 561 (1943); *Lindsey vs. Williams,* 260 S.W. 2d 472 (Mo. 1953), cert. denied 347 U.S. 904; *Swiderski vs. Moodenbough* (1942), D.C. Ore., 45 Fed. Supp. 790; 47 *Dick. L. R.* 129 (1943). In the *Boone* case, although an insurance company was characterized as "the real defendant" the amount of insurance coverage was not in issue. In the *Lindsey* case, the fact that the recovery sought was within policy limits was held to be justification for refusing a continuance due to military service. This position is favorably commented upon in the treatment of the subject given by the *Dickinson Law Review,* supra. In *Swiderski vs. Moodenbough,* a refusal to stay was justified on the ground that the plaintiff agreed to limit the

amount of his recovery to the amount of the liability policy covering the defendant. It has not been previously decided, however, whether an opposite approach should be taken in a case such as the instant one, where the verdict substantially exceeded the defendant's insurance protection. The rationale and implications of the previously cited authorities would indicate that the prejudice arising from an excess verdict would require a stay of proceedings as a matter of law. The lower courts' decisions in the instant case, however, have reached the opposite conclusion.

2. This Court has held that the pivotal question under the Act is whether "the absence of . . . the defendant to conduct his defense is . . . materially affected by reason of his military service." *Boone vs. Lightner,* 319 U.S. 561 (1943). It is important that the Court define more precisely what circumstances materially affect an absent party's defense. Where virtually the only liability issue before a jury will be determined by a party's credibility, is his defense materially affected by his inability to establish that credibility by testifying in person? Is his defense materially affected when his opposition is available to so testify and he is not?

Closely allied with this point is the question of how properly to react to the injection of a new claim during the course of trial in the absence of a party. For example, during the instant litigation, an added claim for damages arose for the first time and was, according to the trial judge, tried "by implication". It is respectfully suggested that this Court determine whether a modification of the issues "materially affects" the conduct of the defense, within the meaning of the Act.

3. Finally, this Court is urged to examine the standards established by the lower courts herein for proving the unavailability of a party in the military service.

These decisions place virtually an insurmountable burden of proof on servicemen seeking the protection afforded them by the Act. If these decisions are permitted to stand the purposes of the act will be thwarted. The difficulty of establishing unavailability at the commencement of, and every day during the course of litigation will now be as great as the burden of prosecuting or defending the lawsuit to be postponed.

CONCLUSION

The provisions of the Soldiers' and Sailors' Relief Act continue to be relied upon very heavily as indicated by the substantial amount of litigation which arises thereunder, and by the sizable portion of our population that is in the military service. Notwithstanding these factors, however, the decided cases leave unanswered questions of great importance to the beneficiaries of the Act and parties engaged in litigation with them. The instant matter presents the opportunity to answer a number of these questions at once.

It is strongly urged that this petition for a writ of certiorari be granted.

Respectfully submitted,
MURRAY C. GOLDMAN,
Attorney for Petitioner.

OPINION OF THE DISTRICT COURT

Kraft, J.

In this personal injury action the jury absolved two defendants, Richard F. Miller (Miller) and Herbert B. Lord, Jr. (Lord) and returned verdicts[1] in plaintiffs' favor only against the remaining defendant, John R. Stearns (Stearns), who has moved for a new trial.[2]

It is unnecessary to dwell, at length, upon the evidence concerning liability, in light of the nature of Stearns' attack on the verdict. Suffice it to say that the evidence amply supports the jury's determination of Stearns' liability. Briefly summarized, the wife-plaintiff was a passenger in her husband's car. This car, while stopped for a traffic signal, was struck in the rear by Miller's automobile, which, initially, had been struck in the rear by Stearns' vehicle. Thereafter, Lord's car struck Stearns' station wagon in the rear, but this collision followed and was unrelated to the Stearns-Miller-Tabor chain-collision. Stearns saw the Miller car stopped 200 feet ahead, but nonetheless, drove his car into the rear of Miller's car at a virtually unabated speed of 20 miles per hour.

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[1] Bonita Tabor $22,000; Lewis H. Tabor, her husband, $7,600; and Bonita M. Tabor, a minor, by her parents and natural guardians, $400.

[2] The plaintiffs have filed a "contingent" motion for a new trial against Miller and Lord, in the event that Stearns prevails on his motion.

In support of his post-trial motion Stearns asserts that:

I—a continuance should have been granted because of Stearns' unavailability due to military service;

II—the issue of life expectancy of the wife-plaintiff should not have been submitted to the jury;

III—the trial judge erred in reading and affirming plaintiffs' point for charge #6, which reads as follows:

"6. A tortfeasor is liable to the full extent of the damage inflicted even though that damage would not have been so great had there not been an already existing condition which was aggravated by the tortfeasor's misconduct. It is no defense to a tortfeasor that his victim was more susceptible to harm than he might reasonably have foreseen: Said another way, a tortfeasor must take his victim as he finds him: Sciandra v. Shovlin, 418 Pa. 378, 381 (1965)";

IV—the jury was not charged with respect to a distinction between interested and disinterested witnesses;

V—the verdict was excessive.

The threshold question, challenging the propriety of the denials of a continuance, requires some extended discussion. The collision occurred on June 9, 1961. Suit was instituted on May 22, 1963. A discovery deposition of defendant, Stearns, was taken September 10, 1963. The case appeared on the trial calendar for the fiscal year 1965-66, but was not reached. In the next year, on Novem-

ber 22, 1966, the case reached the head of the trial list, in the ready pool. All counsel were notified.

Stearns' attorney applied to Judge Body, then Calendar Judge, for a continuance on November 23, 1966. He denied the application, but, endeavoring to accommodate Captain Stearns, ordered the trial for Monday, January 9, 1967.

Counsel for Captain Stearns, on December 8, 1966, applied to Chief Judge Clary, then Calendar Judge, for a continuance. The record of this proceeding (Document 53) discloses that a letter from Captain Stearns to his attorney was read to the Calendar Judge. In that letter, Captain Stearns, a career officer in the United States Air Force, who has served for almost six years, represented that he was undergoing pilot training in Alabama, but would be in Philadelphia from December 23 to December 28, 1966. He also stated that, because of the shortage of pilots and the Viet Nam situation, his commanding officer thought it "highly desirable" that he complete his pilot training without interruption. In closing, Captain Stearns requested his attorney "Please let me know what provisions are made."

This letter and counsel's representations of his client's unavailability were all that were presented to the Chief Judge in support of the application. Chief Judge Clary refused a continuance and ordered that Captain Stearns' trial deposition be taken and the trial begun "on the 9th of January or such time thereafter as we are able to find a judge to assign it to."

The trial deposition of Captain Stearns was completed on December 27, 1966. The case was assigned for trial to

a jury on January 12, 1967. Before the trial commenced, counsel for Captain Stearns again applied for a continuance, which the trial judge, cognizant of the earlier proceedings, denied.

Captain Stearns' counsel contends that the denials of continuance prejudiced his client in depriving him of the opportunity of having his credibility tested, *in person,* as did the remaining litigants. Militating against this factor is the fact that the suit was already more than 3½ years old and involved injuries, which had been suffered nearly 5 years before. Then, too, there was no persuasive showing of Captain Stearns' actual unavailability either by his letter or his trial deposition. The rights and interests of the other litigants merited just consideration as well.

A fair reading of the letter and deposition, at most, warrant the conclusion that it would have been *inconvenient* for Captain Stearns to interrupt his pilot training to appear for trial. No request was made to the trial judge for any special consideration to Captain Stearns, such as, holding an evening or Saturday session, despite the short flight time between Alabama and Philadelphia. No affidavit was ever presented from the defendant's commanding officer or from the defendant, stating affirmatively, that Captain Stearns could not be granted the requisite brief leave.

Under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. §521, a motion for stay of court proceedings is addressed to the discretion of the Court. The pivotal question is whether "the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." *Boone v. Lightner,* 319 U.S. 561 (1943).

"The Soldiers' and Sailors' Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use." *Boone v. Lightner*, id., at p. 575 (emphasis in original).

One important, but hitherto unmentioned fact, is that both the letter and the deposition are silent on the question whether leave was, in fact, available to Captain Stearns, and if so, "Did he apply for a leave at all? The [letter] pretty clearly implied that he had not." *Boone v. Lightner*, id., at p. 572. The fact that Captain Stearns did return to Philadelphia to have his trial deposition taken in December indicates that the prospect of a brief leave to attend the trial was by no means impossible.

Although, ostensibly, the motions for continuance were made on behalf of Captain Stearns, we are fully aware that the real party in interest was Stearns' liability insurance carrier.[3] Recent decisions in this Circuit appear to indicate a trend by the Courts toward a liberalization

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[3] See *Boone v. Lightner*, id. at p. 569 wherein the Court stated: "Such a nominal defendant's absence in military service . . . might be urged by the insurance company, *the real defendant*, as ground for deferring the trial until after the war."

of the rule which rigidly precludes the mention of insurance in personal injury actions. *Kiernan v. VanSchaik,* 347 F. 2d 775 (3 Cir. 1965); *Corbett v. Borandi et al.,* F. 2d (3 Cir. 1967); *Slomberg v. Pennabaker,* 35 L.W. 2598 (M.D. Pa. 1967) (discovery of insurance and policy limits allowed). In our view these motions for continuance presented a factual situation in which the existence of insurance was one of the circumstances to be considered in reaching a decision. The insurance carrier, through its investigators and retained counsel, had full control of the preparation of Captain Stearns' defense. Adequate reasonable notice of the impending trial was given to insurer and insured. Captain Stearns' discovery and trial depositions had been taken.

The primary liability for any adverse judgment against Captain Stearns was the insurer's. While it is true that the plaintiffs' combined claims exceeded the policy limits, we think it noteworthy that, on October 31, 1966, according to the settlement memorandum of the pretrial judge, the plaintiffs' counsel indicated willingness to accept, in settlement of all three actions, a sum which was well within the policy limits. However, insurer's counsel as attorney for the defendant, Stearns, rejected this proposal. During the trial the plaintiffs' counsel, in conference with the trial judge and other counsel, continued to express willingness to settle at the figure recommended by the pre-trial judge, but Stearns' counsel persisted in his rejection of the compromise.

> "It is common knowledge that a defendant in a negligence action, when he is insured has nothing to do with the case, except to come to court and testify as a witness. He does not choose the attorney who is

to defend the action or have any say in the way in which the defense is to be conducted. He does no negotiating for a settlement, he does not have to go out and round up witnesses. All these things are done for him by the insurance adjuster. Insurance companies always carefully reduce their insured's version of the accident to writing as soon after the accident as possible. Once that is done, how then does his military service affect the insurance company's ability to defend the action? To say that the insured is the defendant, and the insurance company is not, is to ignore the facts of the case." Soldiers' and Sailors' Civil Relief Act, 47 Dick. L.R. 129, 135-136 (1943).

We are wholly unpersuaded that the conduct of this defendant's defense was materially affected by his absence. No use was made of his deposition by his own counsel; instead, it was offered only by the plaintiffs. Had Captain Stearns been present, his credibility could scarcely have been enhanced by trial testimony at variance with his earlier sworn trial deposition or his discovery deposition. It is more probable that an unfavorable inference would have been drawn by the jury from any such inconsistent testimony.

Weighing all the relevant factors, including the fact that Captain Stearns was a career officer, whose further period of service in the military was clearly indeterminate, we conclude that the applications for continuance were properly denied.

The defendant next urges that the submission to the jury of the issue of Mrs. Tabor's life expectancy was erroneous. Specifically, the defendant argues that, because

of her prior history of past illness, Mrs. Tabor had a very limited life expectancy, and that expert testimony was required to permit the jury to reach a reasonable conclusion upon her life expectancy. Expert medical opinion, while possibly helpful, was not required. The jury had sufficient evidence to enable it reasonably to decide the probable life expectancy of the plaintiff as it related to her claim for future pain and suffering.

Defendant has submitted no precedents to support his contention. He complains, moreover, that no life expectancy tables were in evidence to assist the jury in deciding this point.

Contrary to the defendant's assertion, more harm than good might have resulted from the submission of life tables to the jury under the facts of this case. Usually, a condition precedent to the use of such tables is that the plaintiff *enjoyed normally good health before the accident. McCaffrey v. Schwartz,* 285 Pa. 563, 576 (1926) (emphasis supplied).

The defendant objects, too, to the allusion by plaintiffs' counsel to the Bible passage concerning a life expectancy of "three score and ten" in his closing speech to the jury.

> "And as a postscript to the enumeration of disapprovals advanced by the defendant, it is urged that plaintiff's counsel abused the law because he 'offered the Bible to establish a life table of "three score and ten years."' The defendant has presented no precedent to bar quotations from the Bible in any phase of legitimate argumentation in court." *Auerbach v. Phila. Transp. Co.,* 421 Pa. 594, 608 (1966).

We gave (pp. 464, 465, 466) adequate instructions to the jury respecting Mrs. Tabor's prior condition of health as it might affect her life expectancy and find this contention of defendant without merit.

We now turn our attention to the defendant's third ground—that the trial judge erred in affirming plaintiffs' point for charge No. 6 (see p. 2). The defendant urges that, since the plaintiff's claim was limited to her injuries resulting from the accident (cervical strain and tendonitis of the right shoulder), none of which existed before the accident, it was prejudicial error to charge in the language of plaintiffs' point No. 6. Defendant argues that the only existing "condition", which the jury could have considered to have been aggravated by the accident, was the plaintiff's emotional or mental illness for which no claim had been made by the plaintiff.

On this aspect we later charged in the language of Stearns' point No. 2:

> "There has been no medical testimony that the accident caused or even aggravated an emotional illness in the plaintiff, Betty Tabor. Therefore, you may find the defendants responsible only for so much of her acute physical complaints as you determine were caused by the collision. The defendants can be held responsible only for so much of her complaints as are truly physical in nature, since there is no evidence that the defendants caused or aggravated a condition of mental illness."

Any prejudice, real or imagined, resulting from our affirmation of plaintiffs' sixth point was corrected by our later affirmation of defendant's second point. *Rodriguez*

v. Brunswick Corporation, 364 F. 2d 282, 286 (3 Cir. 1967); *Mihalic et al. v. Texaco,* F. 2d (3 Cir. 1967).

It is important to note, in this respect, that the *defendant* vigorously attempted to prove through his medical witnesses that Mrs. Tabor's pain was imagined and resulted from some undetermined functional or mental illness. Defendant elicited testimony that, in 1954, Mrs. Tabor suffered a "nervous breakdown" (N.T. 391). Stearns' counsel tried persistently to establish, through medical testimony, that Mrs. Tabor's pain was of a functional or nonorganic nature (N.T. 184, 369, 370, 380, 383, 384, 392, 393).

A substantial part of Mrs. Tabor's claim for damages was based upon her past, present and probable future pain and suffering. She has worn a cervical collar almost continuously since her injury, with little relief. She exhibited notable difficulty and marked discomfort in going to and from the witness stand.

Before this injury, Mrs. Tabor had had a long history of ill health including, *inter alia,* open heart surgery, gynecological problems, pneumonia and a nervous breakdown.[4] Thus, on June 9, 1961, the defendant, Stearns, injured a woman who had suffered a series of intermittent, grave illnesses. It is common knowledge that adjustment and sensitivity to pain vary with each individual. Some are so constituted as to be able to ignore or withstand severe pain; others are constituted less fortunately. The

[4] Since this injury Mrs. Tabor has also experienced a kidney infection, pleurisy, renewed gynecological problems, and rib injuries from a fall in 1965.

jury had ample opportunity, by observation of Mrs. Tabor on the witness stand and throughout the trial, to assess the nature and degree of Mrs. Tabor's suffering, discomfort and inconvenience.

Though plaintiffs' counsel did not claim mental illness or inject that issue into the case, the issue was raised and litigated by the defendant's forceful, unrelenting interrogation on this subject.[5] F.R.C.P. 15(b) provides that if issues are tried by the express or implied consent of the parties they shall be deemed to have been raised and the pleadings amended. *Niedland v. United States,* 338 F. 2d 254, 259 (3 Cir. 1964). Having deliberately raised this issue in an effort to persuade the jury that Mrs. Tabor's claims of continued severe pain and suffering were only the imaginings of a disordered mind, defendant's counsel may not now fairly complain of the consequences of his own election to take the calculated risk, by now conjecturing about its possible effects upon the jury.

The defendant's fourth ground merits only brief discussion. We specifically instructed the jury (p. 444) to "consider the interest or lack of interest of the witness in the outcome of the trial"; and, (p. 445) to consider whether there was ". . . any bias, prejudice or feeling which might cause the testimony of that witness to be influenced or affected thereby."

The final ground, that the verdicts are excessive, is also without merit. The principal attack is made on the $22,000 award to Mrs. Tabor. Stearns places undue em-

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[5] No objection was interposed by the plaintiffs' counsel and the issue was further explored by him on cross-examination.

phasis on the modest medical expenses ($355) incurred for treatment of Mrs. Tabor to support his argument, rejected by the jury, that Mrs. Tabor's pain was "'abnormal and emotionally inspired.'' He stresses the facts that one of plaintiff's doctors had "recommended psychiatric care for her disorder", and that she did not undergo operative procedures to correct her condition. The jury would have been justified in finding that Mrs. Tabor was understandably fearful that, if she submitted to an operation, grave complications might result because of her heart condition; that she was reluctant to have the surgery performed because there was no reasonable assurance of a successful result by any physician who recommended the procedures. "An injured party should take reasonable steps to reduce the damages; if this may be done by a simple and safe surgical operation, a refusal to submit thereto should be considered by the jury in mitigation of damages . . . *but that is not true where the suggested operation is serious and attended by grave danger.*" *Potts v. Guthrie,* 282 Pa. 200, 203 (1925) (emphasis ours); *McCaffrey v. Schwartz,* supra.

Evidence was presented to show that Mrs. Tabor has a 25% permanent limitation of motion in her neck; that she has not performed household tasks since her injury; that her husband was obliged to do all the shopping, cooking, cleaning and washing; that she has not participated in recreational activities, as she did before the accident; that sexual relations with her husband cause her pain and are avoided; that, since her injury, she has experienced almost constant, severe pain and discomfort—abated only by infrequent periods of relief; that she has been unable to lift her young grandchildren; that she must kneel to

get in and out of bed; that a special headrest in the family car is necessary to lessen her discomfort.

As stated earlier, the evidence disclosed that Mrs. Tabor experienced a "nervous breakdown" in 1954. Dr. Vates and Dr. Blaker, in their testimony and reports, expressed their opinions that Mrs. Tabor's problems were probably "functional" and nonorganic in nature (N.T. 392). Dr. Blaker, in his report, noted that there was a "major element of apprehension and anxiety here which is severe enough to completely color the entire picture" (N.T. p. 383). Dr. Resnick examined Mrs. Tabor in 1965, and found that "there were, as I believe, . . . physical *and emotional residuals*, that is there were effects still present in 1965 of the original injury of 1961; that these effects which were still present *were primarily organic,* that is they were physical, . . . there was structural injury to the neck, *but also with an abnormal emotional response to the injury.*" (p. 143) (emphasis ours).

Viewing the entire body of evidence, we think that the jury could reasonably have concluded that Mrs. Tabor's "abnormal emotional response" to her injury was directly attributable to the accident of 1961, and, so, was compensable. Alternatively, the jury might reasonably have concluded that a condition evidenced by the "nervous breakdown" of 1954, though dormant thereafter, was activated by the accident and injury of June 9, 1961. The outward manifestation of Mrs. Tabor's "abnormal emotional response" began soon after the accident, when she began continuously to wear the cervical collar, which defendant contends was neither necessary nor helpful. Several physicians testified that the wearing of the collar limit-

ed Mrs. Tabor's neck movement and contributed to its rigidity. These effects were all directly related to the injury and were part of the plaintiff's claim.

If any prejudice were to result from our charge, it harmed Mrs. Tabor, not Stearns, to instruct the jury peremptorily to exclude entirely all mental or emotional aspects of Mrs. Tabor's claim. *Mihalic et al. v. Texaco,* F. 2d (3 Cir. 1967).

The award to Mr. Tabor cannot be fairly regarded as excessive, in view of his loss of consortium, which was an almost total deprivation of his wife's past and future companionship and services.

Perceiving no merit in the reasons assigned in support of Stearns' motion, we enter the following:

ORDER

Now, this 1st day of June, 1967, it is ordered that

(1) the motion of defendant, John R. Stearns, for new trial be, and it is, denied;

(2) the conditional motion of the plaintiffs for a new trial be, and it is, denied.

C. William Kraft
Judge.

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 16742 and 16743

Bonita M. Tabor, a Minor, by Lewis H. Tabor and Betty W. Tabor, Her Parents and Natural Guardians and Lewis H. Tabor and Betty W. Tabor, Individually and as Husband and Wife,

Appellants in 16743

v.

Richard F. Miller and John R. Stearns and Herbert Boardman Lord, Jr. (3d Pty. Pltf.),
John R. Stearns,

Appellant in 16742

Appeals from the United States District Court for the Eastern District of Pennsylvania

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Argued January 8, 1968
Before McLaughlin, Freedman and Seitz, *Circuit Judges*

OPINION OF THE COURT
(Filed January 25, 1968)

Per Curiam:

Plaintiffs' automobile was the first and defendant Stearns' was the third in line in a four car chain reaction

automobile collision. The drivers of the second and fourth automobiles also were named as defendants, but the jury awarded verdicts against defendant Stearns only. Stearns appeals from the judgments entered against him in favor of the plaintiffs.

At the time of the accident, on June 9, 1961, appellant was on active duty in the United States Air Force. This status has continued to the present time. After the action had been placed on the trial list, appellant's counsel applied on November 23, 1966 for an indefinite postponement of the trial on the ground that appellant, who was then stationed in Selma, Alabama, was unavailable for trial because of his military service. The calendar judge denied the application and set January 9, 1967 as the trial date, subject to further order on application to the calendar judge at a later time. On December 8, 1966 appellant's counsel again applied for a postponement, this time until the fall of 1967. In support of the application he produced a letter from appellant stating that his commanding officer had informed him that it would be "highly desirable" for him to complete without interruption his current pilot training, which would continue until July of 1967, and that he would be in Philadelphia for Christmas leave between December 23 and 28, 1966. The court denied the request and ordered that appellant's trial deposition be taken during his Christmas leave. He had already been examined in a pretrial oral deposition taken by his counsel in 1963. At the commencement of the trial on January 12, 1967 appellant's counsel again requested a continuance, which was denied.

If appellant had been unable to appear because he was on active duty in the armed forces he would have

been entitled to a stay of the action under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §521, "unless, in the opinion of the court, the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." The court had discretion to determine, from all the circumstances of the case, whether a continuance was justified. *Boone v. Lightner,* 319 U.S. 561 (1943). In the present case appellant never stated that it would be impossible for him to appear at trial to testify, and concededly his presence was important principally for that purpose. Appellant testified on deposition only two weeks before the trial, and the only prejudice he might have suffered resulted from his failure to appear before the jury in person. Neither he nor his counsel suggested that the trial be held during his Christmas leave, or that the court schedule a weekend session to accommodate his testimony. Indeed, appellant's letter, written after the trial date was set, did not state that it would be impossible for him to appear, but concluded with the statement that it was "more important" for him to complete his training uninterrupted than to appear at trial. In view of these circumstances, as well as the fact that more than five years had elapsed from the time of the accident at the time appellant made his initial request for a postponement, we conclude that the district court acted within the bounds of its discretion in denying postponement.

Appellant excepted to the court's instruction that the jury should consider the life expectancy of plaintiff Betty Tabor in computing damages for future pain and suffering, if it found that she would experience permanent discomfort as a result of the accident. He claims that the instruction was erroneous because of the absence of any evidence,

such as mortality tables or expert opinion, regarding life expectancy. While mortality tables and technical data are admissible in Pennsylvania on the issue of life expectancy, they are not required. *McCaffrey v. Schwartz*, 285 Pa. 561, 132 Atl. 810 (1926). Indeed, in the *McCaffrey* case the Pennsylvania Supreme Court said:

> ". . . [I]n none of our decisions have we said that such [mortality] tables are necessary to either plaintiff's or defendant's case; we have merely said that they are relevant proofs and admissible when offered.
>
> ". . . Where under the facts of a particular case, the admission of the tables would tend to do more harm than good (if, for instance, the plaintiff did not enjoy normally good health before the accident, . . .) the trial judge, in the exercise of a sound discretion, may bar them, just as he may refuse any other evidence which will tend to confuse or mislead the jury." 285 Pa. at 575-76, 132 Atl. at 815.

Here, instead of generalized evidence of average life expectancy the jury had before it plaintiff's medical history, which included open heart surgery, gynecological problems, and kidney disease, all of which shed light on her life expectancy. Enough evidence was introduced concerning the present and past state of plaintiff's health to allow the jury to act on this necessarily speculative question.

Appellant also argues that the court in its charge submitted to the jury the possible aggravation of plaintiff Betty Tabor's pre-existing conditions, although there was no evidence to justify it. The challenged instruction was directed principally to the familiar doctrine that the tortfeasor takes his victim as he finds him, and is liable for the full extent of the damage he has inflicted, even if it is

greater than he could have foreseen because the plaintiff was particularly susceptible to injury.[1] A passing reference in the instruction to "an already existing condition which was aggravated by the tortfeasor's misconduct", if otherwise confusing or erroneous, was corrected by the affirmance of appellant's second point for charge, which explicitly removed any consideration of aggravation of emotional condition from the case, and emphasized that a tortfeasor is liable only for those injuries which he has actually caused. This last point was reiterated by the court at the very end of its charge, and removed whatever doubts may have remained on the subject. Moreover, appellant had objected only generally to the instruction containing the reference to aggravation, and thus failed to call to the court's attention that his objection went to a single clause in an otherwise unquestionably correct instruction.

Finally, appellant asserts that the verdict of $22,000 in favor of plaintiff Betty Tabor was excessive. There was credible expert testimony that she suffered from serious irremediable discomfort and loss of mobility of her neck, and that she would be required to wear a neck brace indefinitely as a result of the accident. In the light of this evidence, and despite plaintiff's modest medical expenses, we cannot conclude that the verdict, approved by the trial court, was so excessive that we should interfere to correct it.

Plaintiffs have taken a protective appeal (No. 16743) from the denial of their motion for a new trial against all

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[1] *Alexander v. Knight*, 197 Pa. Superior Ct. 79, 177 A. 2d 142, aff'g on opinion below 25 D. & C. 2d 649 (C.P. Phila. 1962); Prosser on Torts (3d ed. 1964), §50, at pp. 300-01. See *Pavorsky v. Engels*, 410 Pa. 100, 102-3, 188 A. 2d 731, 733 (1963).

defendants conditional on the reversal of the judgments of the court below. Because of our affirmance of the judgments, we sustain the denial of the motion.

The judgments will be affirmed in both appeals.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 16742 and 16743

Bonita M. Tabor, a Minor, by Lewis H. Tabor and Betty W. Tabor, Her Parents and Natural Guardians and Lewis H. Tabor and Betty W. Tabor, Individually and as Husband and Wife

v.

Richard F. Miller and John R. Stearns and Herbert Boardman Lord, Jr. (3d Pty. Pltf.)

Present: McLaughlin, Freedman and Seitz,
Circuit Judges

ORDER AMENDING OPINION

The opinion of the Court filed January 25, 1968 in this case is hereby amended as follows:

(1) By adding on page 4, line 8, at the end of the line, a superscript "1".

(2) By substituting on page 4, line 24, a superscript "2" for the superscript "1".

(3) By adding the following footnote at the bottom of page 4:

"1 McCaffrey was overruled in Brodie v. Philadelphia Transportation Co., 415 Pa. 296, 203 A. 2d 657 (1964), regarding the introduction of tables showing the reduction of future damages to their present worth, but the Brodie case has not impaired the authority of McCaffrey on the subject here discussed."

(4) By renumbering footnote "1" to "2".

By the Court,
ABRAHAM L. FREEDMAN,
Circuit Judge.

Dated: February 15, 1968

UPREME COURT, U. S.

MAY 1 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1300.

BONITA M. TABOR, a Minor by LEWIS H. TABOR and BETTY W. TABOR, Her Parents and Natural Guardians, and LEWIS H. TABOR and BETTY W. TABOR, Individually and as Husband and Wife,

Respondents,

vs.

RICHARD F. MILLER and JOHN R. STEARNS and HERBERT BOARDMAN LORD, JR.

BRIEF FOR RESPONDENTS, BONITA M. TABOR, A MINOR BY LEWIS H. TABOR AND BETTY W. TABOR, HER PARENTS AND NATURAL GUARDIANS, AND LEWIS H. TABOR AND BETTY W. TABOR, INDIVIDUALLY AND AS HUSBAND AND WIFE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED BY JOHN R. STEARNS.

GORDON W. GERBER,
DECHERT, PRICE & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102,
Attorneys for Respondents, Bonita M. Tabor, Lewis H. Tabor and Betty W. Tabor.

Of Counsel:
READ ROCAP, JR.,
ROCAP & ROCAP,
2nd & Jackson Streets,
Media, Pennsylvania.

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STATUTE:

Soldiers' & Sailors' Civil Relief Act of 1940: Act of October 17, 1940, C. 888, §201, 54 Stat. 1181, 50 App. U. S. C. §521 ..... 5, 6

QUESTION INVOLVED.

Should this Court grant certiorari in a case where the courts below applied the Soldiers' & Sailors' Civil Relief Act of 1940 in a manner consistent with the standards established by this Court and those followed by other state and federal courts, and refused to postpone indefinitely the trial of a long-pending negligence case at the request of the insurance carrier for one of several defendants, a career Air Force officer in training in Alabama, because the courts below were convinced that the absence of the officer did not materially affect his defense and there was no evidence that he could not personally attend the trial in Pennsylvania?

STATEMENT OF THE CASE.

This diversity action, arising out of an automobile accident, was tried in Philadelphia, Pennsylvania before District Judge C. William Kraft, Jr., and a jury in January, 1967. The jury returned verdicts in favor of the three plaintiffs against the defendant Stearns, who was one of three defendants. The jury exonerated the other two defendants, Miller and Lord, from liability. The jury assessed damages at $22,000 for the wife-plaintiff, $7,600 for the husband-plaintiff, and $400 for the minor-plaintiff.

The accident involved in this suit occurred on June 9, 1961. The Complaint was filed on May 22, 1963. The litigation proceeded through more than three-and-one-half years of trial preparation. Although he was a career Air Force officer stationed in Dover, Delaware, at the time of the accident (142a-144a) and remained in the service continuously thereafter, defendant Stearns never asked for a special trial assignment. Philadelphia is his home and he had readily appeared with all the parties for discovery depositions in September, 1963 (156a). He also appeared so his own counsel could take his trial deposition in December, 1966.

The case appeared on the trial calendar, published during the summer of 1965, for the trial year September 1965 to June 1966. Defendant Stearns made no application for any special trial listing. The case was not reached.

The case appeared on the trial calendar, published during the summer of 1966, for the trial year September 1966 to June 1967. Defendant Stearns did nothing until the case reached the head of the list in the pool of cases ready for trial. Counsel for Stearns then appeared before the Calendar Judge, Judge Ralph C. Body, on November 23, 1966 to request an indefinite postponement. Judge Body refused to

postpone the trial indefinitely. Instead he granted a special listing of the case for trial during the week beginning Monday, January 9, 1967, in order to permit an opportunity for the defendant Stearns to make arrangements to come to Philadelphia, Pennsylvania, from Selma, Alabama, where, according to his counsel, he was in flight training (15a).

On December 8, 1966, counsel for defendant Stearns appeared before the Calendar Judge who was then Chief Judge Thomas J. Clary. Instead of having made arrangements for Stearns to appear at the specially set trial date in January, Stearns' counsel again asked for a continuance, this time until the "fall". This request was denied (21a). Before Chief Judge Clary, Stearns' counsel produced a letter, presumably signed by Captain Stearns, saying he was in flight training in Selma, Alabama, and his Commanding Officer thought it "highly desirable" to complete the training "uninterrupted". There was no suggestion that defendant Stearns (then Capt. Stearns) had applied for leave and been refused and no suggestion that he could not, in fact, attend a trial in Philadelphia even though it might mean missing a day of training. The letter produced by counsel did state, however, that Stearns would be in Philadelphia December 23 to December 28 and to let him know "what provisions are made" (19a)—quite obviously keeping open the question of his availability. Stearns' counsel made no request for a trial between December 23 and December 28 or on any other specific date.

Counsel for defendant Stearns thereafter, on December 27, 1966, in Philadelphia, took his client's deposition for use at trial. Significantly, Capt. Stearns again did not say he could not get leave to come from his flight training base in Alabama, to a trial in Pennsylvania.

The case then went on trial from January 12 to January 19, 1967. Defendant Stearns did not make a request to pre-

sent himself to the Court and jury for an evening or a week-end trial session during the week-long trial.

The evidence of the accident presented at the trial may be briefly summarized.

Lewis H. Tabor and his wife testified that he brought his automobile to a gradual stop in a line of traffic stopped at a traffic signal. After they had been stopped for a few seconds, they heard a loud crash from the rear which did not involve their car. There was then a second loud crash from the rear which did involve their car and which threw their car violently forward (206a-208a, 242a-243a).

Defendant Miller, who was driving the car behind the Tabors, was called for cross-examination by plaintiffs. He also came to a gradual and safe stop. He was thereafter struck from the rear (52a) and his automobile was thrown forward and hit the stopped Tabor car (56a).

Defendant Stearns was the driver of the third car in line. Plaintiffs read into evidence Stearns' trial deposition which had been taken by his own counsel. Stearns testified that he was driving about 30 miles an hour and saw the Miller car some 300 feet in front of him. Stearns observed when he was still some 200 feet from the Miller car, that it was stopped (156a). Nevertheless, he continued forward that 200 feet and struck the rear of the Miller car while his own car was still moving at a speed of about 20 miles per hour (165a).[1]

Defendant Lord, the driver of the fourth car in line, was called by plaintiffs for cross-examination. He didn't know anything about the movements or operation of the Tabor and Miller cars. After the Stearns' car hit the Miller car, Lord hit the rear of Stearns while his own car was going

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[1] This testimony given to his own counsel, was consistent with the sworn deposition testimony he had given when all the parties gave discovery depositions in Philadelphia in September 1963.

3 to 5 miles per hour. That collision did not involve the Tabor car (180a-183a).[2]

Stearns' counsel read into evidence the deposition of a passenger in the Stearns' car, Capt. Ronald Lane. Lane said that the Stearns' car was moving about 30 miles per hour and was within 150 feet of the Miller car before the brakes were applied (276a, 286a-287a). He testified that the Stearns' car was moving 20 to 25 miles per hour when it struck the rear of the Miller car (277a-278a, 282a).

The jury concluded that the accident was caused by the negligence of defendant Stearns whose motion for a new trial, based on a variety of reasons, was denied by the District Court. Stearns appealed. The Court of Appeals, Judges McLaughlin, Freedman and Seitz, affirmed the judgment of the District Court. Defendant Stearns now petitions for certiorari.

ARGUMENT.

Petitioner argues that certiorari should be granted on the alleged ground that the Courts below have decided this case "contrary to the trend of earlier decisions of other federal and state courts" (Pet. 7) in applying the Soldiers' & Sailors' Civil Relief Act of 1940: Act of October 17, 1940, C. 888, §201, 54 Stat. 1181, 50 App. U. S. C. §521. Even if there were such a "trend" that would not be a "conflict of decisions" as contemplated by this Court's Rule 19. However, the present case is not contrary to earlier decisions.

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[2] Contrary to the suggestion in the Petition (p. 5), Upper Darby Township police officer Celia, called as a witness by defendant Stearns, had no first-hand knowledge and no personal recollections of the accident or events (220a).

Indeed, the present decision is authorized by the statute and supported by the earlier cases.

Under the Soldiers' & Sailors' Civil Relief Act an action in which a person in military service is involved is to be stayed "unless, in the opinion of the Court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."[3] Since this Court's decision in *Boone v. Lightner*, 319 U. S. 561 (1943), the cases have uniformly applied this Court's ruling that a Trial Court may properly exercise its discretion to conclude that a case should not be deferred simply because a party is in the Armed Service. The exercise of discretion in favor of an applicant must be justified by some genuine explanation, on the record, of (1) the inability of the party to appear at the trial and (2) the material, adverse effect of his absence.

Among the cases refusing postponements are: *Runge v. Fleming*, 181 F. Supp. 224 (D. C. Iowa 1960) (act should not be used as an instrument for oppression of opposing parties); *Womack v. Berry*, 291 S. W. 2d 677 (Tex. 1956) (act should not be used as a device to delay proper and expeditious determinations of legal proceedings); *Lindsey v. Williams*, 260 S. W. 2d 472 (Mo. 1953), cert. denied, 347 U. S. 904 (defendant's testimony obtained by deposition and he was covered by insurance); *Graves v. Bednar*, 95 N. W. 2d 123 (Neb. 1959) (defendant had been in and out

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[3] The Act provides:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501-548 and 560-590 of this Appendix], **unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.**" (Emphasis added.)

of jurisdiction while case was pending and took no action to have case set for trial); *Mayfair Sales, Inc. v. Sams,* 169 So. 2d 150 (La. App. 1964) (person in military service not entitled to automatic stay of proceedings, he must show definitely where his rights would be prejudiced by the suit going to trial); *Culver v. Superior Court In And For Los Angeles County,* 270 P. 2d 78 (Cal. App. 1954) (where soldier's testimony could have been obtained with reasonable diligence, refusal of continuance to soldier was not error).

In exercising the discretion granted to it, the trial court in the present case concluded that petitioner's absence did not materially affect his defense. Moreover, the trial court was not satisfied that petitioner was, in fact, not able to appear personally at the trial.

The conclusions of the lower court in this case were not only justified, they were virtually inescapable.

It is apparent that a finding that defendant Stearns was not prevented from attending the trial of this case had he and his counsel wanted him present was amply justified. During the more than three-and-one-half years the case awaited a trial assignment in Philadelphia, Stearns never asked for a special trial listing although he was at all times stationed in the United States and periodically was in Philadelphia, his home. On the eve of trial, Stearns was granted a special trial date more than a month off. Stearns then came to Philadelphia where his own counsel took his trial deposition but did not ask for a trial. Neither Stearns nor anyone else suggested that Stearns had applied for leave to attend the trial, that such leave had been refused or that it was not possible for him to attend the trial. During the course of the trial itself neither Stearns nor his counsel requested a weekend or evening session to enable Stearns to come to Philadelphia, Pennsylvania and testify.

Secondly, a finding that there was no material, adverse effect on Stearns' defense flowing from his absence was also more than justified. Stearns' testimony was taken twice in depositions—the second time by his own counsel. It was plaintiffs, not defendant Stearns, who then sought to call defendant Stearns as a witness at the trial. And when plaintiffs presented the testimony of Captain Stearns, they used the deposition taken by his own counsel. As a matter of fact, the description of the accident given by Captain Stearns and his passenger convicted Stearns of negligence.[4] It could hardly be seriously suggested that Stearns' appearance at trial to change his testimony from his two sworn depositions would have helped his cause. On this aspect, the trial judge specifically stated (Pet. 16): "We are wholly unpersuaded that the conduct of this defendant's defense was materially affected by his absence."

Petitioner suggests that a "new claim" arose during the course of trial and this Court should determine whether that materially affected his defense. Petitioner fails to state that the new issue was a medical issue about which the petitioner would have no knowledge (i.e., a claim that the wife-plaintiff was "mentally ill" and not physically hurt). Defendant Stearns also fails to mention that it was his counsel who injected the "new issue" into the trial. In the opinion of the trial judge, he noted (Pet. 20): "Though plaintiffs' counsel did not claim mental illness or inject that issue into the case, the issue was raised and litigated by the defendant's forceful, unrelenting interrogation on this subject." This Court said, in *Boone v. Lightner,* that it is for lower courts to resolve questions of whether a so called

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[4] Stearns saw Miller stopped in front of him when 200 feet away. Nevertheless, he slowed only from about 30 miles per hour to about 20 miles per hour during that 200 feet before the impact.

"new claim" materially affected a defense. The Courts below resolved that question in this case, and, it is submitted, correctly.

Petitioner suggests that certiorari should be granted because the amount of the recovery exceeded the amount of the liability insurance policy of defendant Stearns. The record is silent on the subject of the amount of Stearns' liability coverage so respondent is not able to reply to this argument on a factual basis. However, it should be noted that this argument is a reversal of Stearns' position prior to his present petition. Throughout the arguments in the District Court and Court of Appeals defendant Stearns maintained steadfastly that the existence of insurance coverage was irrelevant to the question of whether he should be granted a postponement. It was in disagreeing with this argument that the trial judge pointed out that the real party in interest and the party financially liable is the liability insurance carrier which had refused plaintiffs' offers to settle within the limits of the carrier's policy both before and during the trial (Pet. 14-15). The trial court's observation was consistent with *Boone v. Lightner* where this Court said that insurance coverage may be a factor to be considered by lower courts and may be a factor suggesting that a postponement should not be granted because the real party in interest is the insurance carrier rather than its insured. However, the existence of insurance coverage is, as this Court has clearly held, simply one of the circumstances to be entrusted to the consideration and discretion of trial courts. One thing appears certain. Petitioner's suggested rule would be an odd one: go to trial and if the plaintiff

loses or gets a small verdict, let the results stand; otherwise give the insurance carrier a second try.[5]

CONCLUSION.

This Court has held that trial courts have the responsibility for determining the factual question of whether a service man is genuinely unavailable to attend a trial and whether his absence would materially affect (or has materially affected) his defense. The rule is a sound one and was applied in the present case, with understanding, by the trial court. A unanimous Court of Appeals agreed and affirmed the trial court's decision.

It is respectfully suggested that the present case involves no conflict of decisions and no question or issue justifying review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GORDON W. GERBER,
Attorney for Respondents,
Bonita M. Tabor, Lewis H. Tabor and Betty W. Tabor.

Of Counsel:
READ ROCAP, JR.,
ROCAP & ROCAP.

April, 1968.

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[5] After the trial, Stearns' counsel suggested to the District Court and plaintiffs' counsel that the verdicts were greater than Stearns' coverage (Pet. 15), and the trial court noted that it was Stearns' carrier which refused to accept plaintiffs' offers to settle within the limits of coverage both before and during the trial (Pet. 15). Its counsel also declined plaintiffs' offer, after trial, to satisfy the judgments upon payment of the amounts which the court might determine were the limits of the carrier's coverage. It is now and always has been the insurance company which has defended and negotiated this case (Pet. 14-15). It will be that company, not Stearns, who will have to pay the judgments: see **Gray v. Nationwide Mutual Ins. Co.**, 422 Pa. 500 (1966).